FILE
MICHAEL RODAK, JR

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-1537

JACK KERSHAW,

Petitioner,

v.

ELBERT D. BROOKS, et al.,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR REHEARING

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Attorney for Petitioner

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The petitioner respectfully prays the Court to grant him a rehearing of this Court's action of October 9, 1973, in denying his petition for certiorari to the United States Court of Appeals for the Sixth Circuit to review a decree affirming a decree of the United States District Court for the Middle District of Tennessee.

It is respectfully submitted that the following questions not specifically set out in the previous petition should be considered, whether or not the Court desires to review the full merits:

1. Whether or not the Court of Appeals judgment should be vacated and remanded for clarification whether its order relates only to the single paragraph of the District Court's injunction quoted on the appeal

(A22)[1]—or whether it also applies to the portion that added: "Furthermore, the defendants and each of them and any and all attorneys whom they may employ are enjoined from taking any action of any kind or character which interferes with the implementation of the orders of the United States District Court for the Middle District of Tennessee in the case of Robert W. Kelley, et al. v. Metropolitan County Board of Education." (A21)

2. Whether the judgment below should be vacated and remanded for a full hearing on the merits without the defendants' original counsel being precluded from representing their clients in the federal court proceedings by the necessity of obtaining counsel for their own personal defense.

These are important questions affecting the future conduct of the petitioner and all other lawyers and questions which have never before been decided by this court or squarely decided by the courts below or any other court so far as present counsel is aware, although they have been implicit in the record from the beginning of the District Court's original precipitous action in making the petitioner a defendant on the Court's own motion.

The first question is especially important to the present petitioner's future liberty and property rights. The portion of the injunction quoted by the Court of Appeals (A.25) enjoined the defendant only from "seeking an injunction or restraining order".

The immediately following sentence of the injunction of the District Court, however, is capable of being interpreted by an angry judge in the future as applying to matters other than lititgation and to actions in capacities other than as

[1]Parenthetical references are to pages of the appendix of the original petition for certiorari.

lawyers, including efforts to obtain a constitutional amendment, or to support legislative candidates who take or promise to take actions to eliminate or ameliorate the evils of busing, as many candidates have done both before and since the injunction.

Indeed, it may be interpreted as preventing the petitioner, as lawyer or otherwise, from petitioning the school board or other state officials to take action within their continuing plenary responsibilities as stated by this court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). This Court said in that case, *inter alia*, that:

> "[I]t is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults." [402 U.S. at 16]

> "Neither school authorities nor district courts are consitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." [402 U.S. at 31-32]

This is especially true because the original state court complaint that initiated the present proceedings, included among its legal averments the essence of the first quotation above and included the second one verbatim, as well as other portions of the *Swann* opinion as bases for the State Court inquiry into the local school board's own decisions in implementing the plan approved by the United States District Court.

THE PREMISES CONSIDERED, the petitioner prays that he be granted a rehearing on his petition for the writ of certiorari, and that upon the rehearing the writ be granted and the judgment below should be vacated and remanded for further hearing.

Respectfully submitted,

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CERTIFICATE

It is hereby certified that the foregoing petition is presented in good faith and not for purposes of delay, and that its content is restricted to grounds believed to be substantial and to be available to petitioner, although not previously presented.

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Attorney for Petitioner